No. 85-5915

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BRENDA E. WRIGHT, GERALDINE H. BROUGHMAN, and SYLVIA P. CARTER individually and on behalf of all persons similarly situated,

Petitioners,

v.

CITY OF ROANOKE REDEVELOPMENT AND HOUSING AUTHORITY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Does the Brooke Amendment to the Housing Act of 1937 vest public housing tenants with substantive rights of the sort which can be enforced under § 1983?

2. Does 42 U.S.C. § 1983 authorize private enforcement of a federal entitlement only if a right of action can also be implied from the underlying federal statute?

3. Did Congress, by vesting HUD with general regulatory authority in the United States Housing Act of 1937, intend to foreclose private enforcement of the Act pursuant to § 1983?

4. Must the federal courts entertain, under federal question jurisdiction, a right of action upon a tenant lease which unavoidably raises a substantial federal issue under the Housing Act of 1937 and implementing regulations?

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OPINIONS BELOW

The opinion entered by the Court of Appeals for the Fourth Circuit in No. 85-1068 (August 26, 1985) is published at 771 F.2d 833 (4th Cir. 1985), and included in the joint appendix at JA30. The order and opinion of the District Court are published at 605 F.Supp. 532 (W.D. Va. 1984), and included in the joint appendix at JA19 and JA29.

JURISDICTION

The judgment of the Court of Appeals was entered on August 26, 1985, and a timely petition filed within 90 days thereafter. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. § 1254(1). The writ of certiorari was granted on January 21, 1986.

STATUTES AND REGULATIONS INVOLVED

The following statutes and regulations central to the case are set forth in a statutory appendix to this brief:

28 U.S.C. § 1331 ..... SA1
42 U.S.C. § 1983 ..... SA1
42 U.S.C. § 1437a(1) (effective January 1, 1980) ... SA1
42 U.S.C. § 1437(a) (effective October 1, 1981) SA2
24 C.F.R. § 860.403 (1982) SA3
24 C.F.R. §§ 865.470-.482 (1983) SA4

STATEMENT OF THE CASE

Petitioners are low-income tenants of public housing projects owned and operated by respondent City of Roanoke Redevelopment and Housing Authority ("the Authority"). They complain that the Authority has required its tenants to pay rental surcharges for electric utility service which are in violation of the rent limits imposed by Congress through the Brooke Amendment to the United States Housing Act of 1937, 42 U.S.C. § 1437-37j ("USHA"), and implementing regulations of

the United States Department of Housing and Urban Development ("HUD").

The Authority's projects were built and are operated with subsidies under USHA. A critical portion of USHA is the Brooke Amendment, added in 1969, which limits the rent which can be charged low-income public housing tenants. A companion provision subsidizes local public housing agencies ("PHAs") to cover the resulting deficit in operating costs. When these claims arose the relevant portion of the Brooke Amendment, 42 U.S.C. § 1437a(1) (statutory appendix at SA1), limited the rent which could be charged a family of very low income to 25% of family income.[1]

In the absence of careful definitions, PHAs could easily evade the Brooke Amendment limit by adding on a host of other charges for essential services to achieve the same effect as higher rents. To avoid this problem HUD has historically considered "rent" in the public housing program to include shelter cost plus a reasonable amount for utilities. A charge for any part of a "reasonable utility allowance" violates the rent ceiling established by the Brooke Amendment. A housing authority may impose additional rental surcharges only for "excessive" consumption.

The Housing Authority purchases electricity from the power company through a master meter and distributes the electricity to the tenant units through individual

[1] The present version of the Brooke Amendment, now 42 U.S.C. § 1437a(a), is worded differently (SA2) and fixes rent at 30% of income for families of lower income. Amendment has had no operative effect on this suit, since the Housing Authority has always maintained its rent levels at the highest percentage authorized.

checkmeters (Int. ans. no. 4).[2] Since at least 1969 the Housing Authority has maintained a schedule of electricity allowances for project apartments by size and period of year (Int. ans. no. 11). The allowances were calculated by Housing Authority management in consultation with the power company, and before this suit were last revised in 1977 (Int. ans. no. 11). There is no remaining record of what consumption requirements, if any, were considered in designing or revising the allowances (Int. ans. no. 12). If the allowances ever had a rational basis, evidence of that could not be produced by the Housing Authority.

The standard against which these allowances are to be measured is set by HUD's regulations entitled "Tenant Allowances for Utilities," 24 C.F.R. §§ 865.470-.482 (1983), promulgated at 45 Fed. Reg. 59502, 59505 (1980) (statutory appendix at SA4-13). HUD's utility regulations had several main thrusts:

(1) they were mandatory, as opposed to the previous non-mandatory guidelines (§ 865.473);

(2) they required each PHA to recalculate its utilities allowances on the basis of current data (§ 865.476);

(3) they required the allowances thus established to meet the needs of 90% of the dwelling units of each type and size (§ 865.476);

(4) they required the PHA to give notice of the proposed allowances with an opportunity for tenant comment

[2] These and subsequent facts were made part of the record in support of the tenants' motion for summary judgment on the Authority's liability. The factual showing was drawn from the Authority's responses to discovery and has not been disputed, so that there is no "genuine dispute of material fact," Fed.R. Civ. P. 56.

(§ 865.473, prior to amendment at 47 Fed. Reg. 19123 (1982));

(5) they required that the PHA advise tenants of what major equipment consumption had been included in the allowances, in order to avoid misunderstanding (§ 865.473); and

(6) they required that the PHA review tenant billings for excess consumption after every quarter, and consider revision of the allowances if surcharges exceeded 25% of any category of units (§ 865.480(b)(i)).

HUD's utility allowance regulations became effective October 1, 1980, with full compliance required by January 28, 1981, 24 C.F.R. § 865.482. The Housing Authority was duly notified of the regulation by HUD and encouraged to comply even before the deadline if possible (Int. ans. no. 19).

The Authority did absolutely nothing to comply. The Housing Authority "deemed its procedures in effect . . . as being in substantial compliance" (Int. ans. no. 19(c)). The Authority did not use its existing consumption data to calculate whether existing allowances would meet 24 C.F.R. § 865.477's standard, sufficiency to meet the requirements of 90% of the dwelling units in each category. (*Id.*) It did not attempt to include consumption requirements of major equipment furnished by the Authority. It did not include with its rent schedules a list of the specific items of major equipment whose utility consumption requirements were included in determining the allowances, and did not make such a list available to tenants (Int. ans. no. 16). Since it went through no review process, the Authority naturally did not go through the process for tenant notice and comment which was then mandated for such revisions. The January 28, 1981, deadline for use of the new standards came and went, with no action by the Authority. The Authority continued to surcharge tenants 3 cents per KWH for consumption in excess of the allowances, but never reviewed the percentage of tenants surcharged to see if it exceeded 25%, and never used those findings to establish a revised allowance (answer ¶ 10, JA13).

The consumption data supplied by the Authority shows that instead of 10% or less, the vast majority of tenant families paid a utilities rental surcharge for most quarters after the effective date of the utility regulation (Int. ans. no. 7). The percentage of surcharges in Lansdowne Park project, for instance, ranged from a low of 65% for 1-bedroom units in the second quarter of 1982 to a high of 100% for 4-bedroom units in the 1st quarter in 1981. Throughout the projects, larger units were always in the higher ranges, often 99-100%. Over the two-year period 1981-1982 the total dollar amount of the surcharges was $113,114.54 (Int. ans. no. 8).

The high percentage of surcharges is not surprising considering the overall increase in electrical consumption between the 1977 revision and 1981, when the Housing Authority "deemed" those allowances to be adequate compliance with the new regulations. During this period consumption for the 7 projects in question rose from 4,632,928 to 5,104,762 kilowatt hours—a 9.82% increase (Int. ans. no. 9)—despite the heavy disincentive of the rental surcharge. The increase from 1969, when the allowances were first established, would undoubtedly be more dramatic, but the Authority was not able to provide consumption figures going back that far.

Effective April 1, 1982, the Authority again revised its inadequate electrical utilities allowances, but only to make the situation worse. It increased the rental surcharge by 50%, from 3 cents to 4.5 cents per KWH; and it averaged quarterly variations in the 1977 allowances, rounding the resulting figure upward to the nearest 10

KWH (Int. ans. no. 10), an obvious administrative convenience but hardly an attempt at realism.[3] This revision did not purport to be based on the consumption data and standards called for by the federal regulation (Int. ans. no. 10). No prior notice or opportunity to comment was given to tenants prior to the adoption of the revised allowances, although these were still required by 24 C.F.R. § 865.473. The per KWH surcharge established for excess consumption (4.5 cents), based on predicted future cost of the overall average KWH for the projects in question (Int. ans. no. 6), well exceeded the actual cost of the excess consumption to the Authority at the time (Int. ans. no. 6).

Petitioners are tenants who lived with their families in the Authority's projects. All were families of "very low income" within USHA's statutory scheme. Brenda Wright had lived in her project for 11 years, and utilities surcharges placed a serious drain upon her modest earnings as a hospital dietary aide (complaint ¶ 25-26, JA8). Geraldine Broughman's public assistance and work training stipend were so stretched by quarterly utility surcharges that she often needed several months to pay them off. She had lived in her project over 4 years and could not remember any quarter when she and her neighbors escaped a utility surcharge to their rent (complaint ¶ 27-29, JA9). Sylvia Carter's surcharge for the quarter

[3] In fact, the 1982 modifications were an allowance *decrease* in practice. If it was realistic to give a higher allowance in winter than in summer—the Housing Authority's practice 1969-82—then averaging the 2 seasons would produce an unneeded surplus in the summer and a predictable excess consumption in the winter. The tenant gets no benefits from the unused summer allowance, while the Authority gets to charge for excess usage in winter. The supposedly neutral average is therefore a net loss to the tenant and a revenue producer for the Authority. The practice is contrary to the intent of the HUD Regulations at 24 C.F.R. § 865.475(a).

preceding suit ($44.28) was almost as much as her monthly rent ($48), and such rental surcharges always strained her public assistance resources (complaint ¶ 30-31, JA9).

These tenants filed this class action suit against the Authority on December 9, 1982, in the District Court for the Western District of Virginia at Roanoke. Their complaint stated two claims: (1) a claim under 42 U.S.C. § 1983 that the Authority was violating their rights under the Brooke Amendment and implementing regulations; and (2) a claim under the Authority's standard lease, in which the Authority agrees to furnish "utilities as reasonably necessary" at no cost additional to the rent. The tenants sought injunctive relief and refund of illegal rental surcharges for themselves and a class.

Jurisdiction of the District Court was invoked under 28 U.S.C. § 1331 (in that the claims raised federal questions under the Brooke Amendment and HUD regulations); 28 U.S.C. § 1337 (insofar as the Brooke Amendment is an exercise of the power of Congress to regulate interstate commerce); and 28 U.S.C. § 1343 (3) and (4) (in that the § 1983 claim asserted a denial of civil rights). Pendent jurisdiction was pled over any state law issues.

Even the filing of the suit did not induce the Authority to comply with the HUD regulations. A class was certified under R. 23(a), (b)(2) and (b)(3). A period of discovery and negotiation followed, and the Authority agreed to escrow future utility surcharges. The Authority moved for judgment on the pleadings asserting that (1) tenants have no implied right of action to enforce the Brooke Amendment; (2) the Brooke Amendment creates no substantive rights enforceable through § 1983; and (3) the tenants' failure to join HUD, an indispensable party, mandates dismissal. The tenants moved for summary judgment on their § 1983 claim under the Brooke Amendment and regulations, and

opposed the dismissal. While the motions were pending, HUD adopted new utilities regulations (24 C.F.R. § 965.470-.480) (1985), promulgated at 49 Fed. Reg. 31399 (1984) and the Authority finally revised its allowances effective January 2, 1985.[4] The parties agree that the request for injunctive relief was mooted by this action; but the tenants' claim for recovery of past improper charges through January 1, 1985 remained.

The district court treated the Authority's motion for judgment on the pleadings as one for summary judgment and granted summary judgment of dismissal. The district court's opinion (JA19, 605 F.Supp. 532) accepted the invitation to find no implied right of action (JA21-25) although the tenants had never urged that basis for their suit. The district court then reasoned that if no right of action could be implied, no right enforceable under § 1983 could exist (JA27-28). Even if it did, then it was foreclosed from § 1983 enforcement by Congress' grant of regulatory authority to HUD (JA25-27). Finally, the district court dismissed the lease claim as a discretionary exercise of pendent jurisdiction over state law claims (JA28, n.9), despite the position of the tenants that the lease claim constituted an independent basis of federal question jurisdiction raising a substantial federal question.

On appeal the Court of Appeals for the Fourth Circuit affirmed. The opinion (JA30, 771 F.2d 833) read that court's previous decisions to say that Congress intended to foreclose private § 1983 enforcement of *any* section of the United States Housing Act of 1937 (JA37). Despite the attempt of a concurring judge to separate the framework of analysis (JA40), the court persisted in an implied right of action analysis, characterizing that inquiry as "similar,

[4] The procedural and substantive propriety of the 1985 allowances is not in issue.

if not perfectly congruent" to examination of § 1983's exceptions (JA38, n.9). Finally, the court upheld the dismissal of the lease claim as an exercise of discretion (JA38).

SUMMARY OF ARGUMENT

Since 1969 the Brooke Amendment to the United States Housing Act of 1937 (now codified as 42 U.S.C. § 1437a(a)) has limited the rent which low-income tenants can be required to pay in public housing projects—originally to 25% of income, now 30%. This rental limit is the essential feature of the entire federal public housing program. On the one hand it assures that the neediest families will have access to public housing without paying a market rent beyond their means; on the other hand it generates an income base against which federal operating subsidies are calculated and paid to the local authorities. While these are its effects, its mechanism is to vest a right to the limited rental in the tenants themselves.

This suit to enforce the Brooke Amendment and its implementing regulations relies in part on § 1983 for a tenant right to sue, following *Maine* v. *Thiboutot*. The case meets the requirements of *Pennhurst State School and Hosp.* v. *Halderman* (Did the plaintiffs have substantive rights secured by federal statute?) and of *Middlesex County Sewerage Auth.* v. *Nat'l Sea Clammers Ass'n* (Did Congress intend to supplant § 1983 by creating comprehensive remedial devices in the statutory scheme?).

Through sixteen years of amendment, recodification, and shifting fashions in housing policy, the Brooke Amendment has remained remarkably constant in its clear, mandatory and specific grant of a substantive right to low income tenants. To implement the Brooke Amendment, HUD has followed the lead of Congress by defining rent to include a reasonable allowance of utilities. In 24

C.F.R. § 865.470-.482 (first promulgated in 1980) HUD told the housing authorities in terms as clear, mandatory, and specific as the statute itself how to calculate utilities allowances within the Brooke limits on rents. The wording of both the Brooke Amendment and HUD's allowance regulations vests substantive rights in the tenants themselves, meeting the test of *Pennhurst*.

From the opinions in *Sea Clammers*, *Pennhurst*, and *Smith* v. *Robinson*, it appears that at least a majority of the Court believe that a § 1983 plaintiff enjoys the presumption that Congress intended its express § 1983 remedy to be available for enforcement of an identifiable substantive right in a federal statute; the burden is on the defendant to show a specific congressional intent to the contrary from explicit evidence in the statute or legislative history if a *Sea Clammers* exception is to apply. While purporting to find a *Sea Clammers* exception, the Fourth Circuit effectively merged that test with a *Cort* v. *Ash* implied rights inquiry, where the burden is clearly upon the plaintiff to establish affirmative evidence of congressional intent. Neither the Brooke Amendment nor USHA generally contains any express statutory evidence of intent to supplant § 1983, nor any alternative remedy. The Fourth Circuit saw this as reason to find no private right of action (a possible implied rights conclusion) when it should have seen the same evidence as support for a private right of action under § 1983.

A proper *Sea Clammers* inquiry should have ended there; instead, the Fourth Circuit relied on the general regulatory authority of HUD as evidence of congressional intent to supplant § 1983 suits. That holding and grounds are unjustified by *Sea Clammers*, are based on an inaccurate reading of HUD's actual authority, and disregard the particular stake which tenants have in the Brooke Amendment rent limits. Preclusion is particularly unlikely because tenants are given no way to trigger HUD enforcement, and exhaustion of purely administrative

remedies is not normally a prequisite of § 1983 in the first place. HUD's own trend has been away from enforcement of Brooke rent limits and utility allowances, and HUD has in similar cases disclaimed even the authority to enforce Brooke.

This is not a joint federal-state funding scheme, but one where the money comes only from the tenants themselves (in rent) and from HUD. Restitution of illegal rental surcharges is simply a return to tenants of their own money and is entirely compatible with the public housing funding scheme, particularly where the Authority's dereliction has been intentional, prolonged, and obstinate.

Finally, and separate from the § 1983 claim, the tenants asserted a federal question jurisdiction claim under their lease and the Fourth Circuit should have honored it. Action on the lease is recognized in state law, but interpretation of a lease provision for furnishing "utilities as reasonably necessary" is uniquely dependent upon the Brooke Amendment and HUD regulations, since it has no point of reference in state law. This "substantial question of federal law" was properly pled, is unavoidably presented, and falls into the mandatory § 1331 jurisdiction of the federal courts, *Franchise Tax Bd.* v. *Construction Lab'rs Vacation Trust*, rather than being a matter of discretionary pendent state jurisdiction. This does not make every public housing lease claim a federal question; it simply follows this Court's federal question precedents instead of confounding them.

ARGUMENT

This case represents a simple application of the § 1983 Civil Rights Act remedy[5] to a statutory entitlement,

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[5] 42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or

following *Maine* v. *Thiboutot*.[6] The low-income tenants who brought the suit are citizens with specific and mandatory rights to limited rental payments under federal law (Point II of this brief). The Authority is a "person," *Monell* v. *Department of Social Serv.*, 436 U.S. 658 (1978), and concedes that it acts under color of state law (answer ¶ 3, JA12). The rental surcharges extracted from the tenants for excess utility consumption were without question a deprivation. Congress did not intend to preclude a private § 1983 remedy (Point III of the brief).

How was such a straightforward application of § 1983 thwarted in this case? The answer, unfortunately, is that the court of appeals badly muddled the tests of *Pennhurst State School and Hosp.* v. *Halderman*[7] (does the plaintiff have substantive rights in the federal law?) and *Middlesex County Sewerage Auth.* v. *Nat'l Sea Clammers Ass'n*[8] (does the statutory enforcement scheme show that Congress intended to preclude a § 1983 remedy?). In the process the court has also confused the implied rights analysis of *Cort* v. *Ash*[9] with the analysis of § 1983 preclusion to erode *Thiboutot*. The effect is to divest public housing tenants of any meaningful federal rights.

Quite independently of § 1983, the tenants in this case also assert a right to sue on their lease, within the jurisdiction of the federal courts. The dismissal of that claim was also erroneous, and creates serious problems for the federal question jurisdiction of the courts. That point is reviewed in the last section of this brief.

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causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

[6] *Thiboutot*, 448 U.S. 1 (1980), held that the protection of § 1983 extends to rights, privileges and immunities secured by all federal statutes, not just to the Constitution and civil rights laws. In dissent, Justice Powell noted that USHA was one of the statutes which arguably could be enforced under the majority's view of § 1983. 448 U.S. at 36.

[7] In *Pennhurst*, 451 U.S. 1 (1981), this Court reviewed the claim of a mentally retarded resident to enforce the patient "Bill of Rights" and other provisions of the Developmentally Disabled Assistance Act. The Court concluded, 451 U.S. at 21, that the Bill of Rights for patients was not actually intended by Congress to give patients any substantive rights or impose affirmative duties on the States. The provision was simply a "findings" section which expressed federal policy in a "hortatory, not mandatory" sense, and was not backed up by the funding necessary for implementation. 451 U.S. at 24. That claim was denied, and the balance of DDA claims remanded for determination of whether patients had "rights secured" by other sections. 451 U.S. at 31.

[8] *Sea Clammers*, 453 U.S. 1 (1981), held that a right of action could not be implied for shell fishermen to enforce the Federal Water Pollution Control Act and Marine Protection, Research and Sanctuaries Act. The Court also considered whether § 1983 was an express congressional authorization of private suits to enforce those environmental acts. Noting the plethora of specific statutory remedies including citizen-suit provisions, the Court concluded that the express remedies not only showed congressional intent to foreclose implied private actions but also to supplant any remedy under § 1983. 453 U.S. at 21.

[9] In *Cort* v. *Ash*, 422 U.S. 66 (1975) the Court identified four factors to be examined to determine whether Congress intended that the courts imply a right of action from a federal statute: (1) is the plaintiff one of the class for whose especial benefit the statute was enacted? (2) is there explicit or implicit evidence of legislative intent to create or deny a private remedy? (3) is an implied remedy for the plaintiff consistent with the underlying purposes of the legislative scheme? (4) is the cause of action one traditionally relegated to state law? 422 U.S. at 78. The Supreme Court has subsequently emphasized the second factor, *see, e.g. Touch Ross & Co.* v. *Redington*, 442 U.S. 560, 578 (1979).

I. THE BROOKE AMENDMENT TO THE HOUSING ACT OF 1937 VESTS PUBLIC HOUSING TENANTS WITH A SUBSTANTIVE RIGHT TO LIMITED RENTS.

Following *Pennhurst*, the court of appeals properly undertook to examine whether the plaintiff tenants in this case had "rights secured" by the Brooke Amendment for § 1983 enforcement (JA33). It then failed to do so. The court reviewed its previous decision in *Perry* v. *Housing Authority*, 664 F.2d 1210, 1217-18 (4th Cir. 1981), noting that the purpose clause of USHA (42 U.S.C. § 1437), like the findings clause in *Pennhurst*, was merely precatory; it did not intend to vest legal rights to particular housing maintenance standards in public housing tenants (JA34). Similarly it reviewed *Phelps* v. *Housing Authority*, 742 F.2d 816, 820-22 (4th Cir. 1984), where it held that the tenant preference provisions of USHA did not intend to vest particular public housing applicants with a right to be selected for admission in relation to other such groups (JA36). When it reached the present case, however, the Fourth Circuit made no examination of the Brooke Amendment.[10] It reluctantly concluded without explanation that "the plaintiffs under 42 U.S.C. § 1437a have certain rights . . ." (JA37).[11]

While this conclusion is correct,[12] the Fourth Circuit

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[10] While it is appropriate under *Pennhurst* to look at the object and policy of the whole law, 451 U.S. at 18, the particular statutory provisions at issue must be closely examined, *id.* at 19-22.

[11] The curious tautology that follows this concession (JA37) seems to reflect a *Sea Clammers* preclusion problem rather than a *Pennhurst* rights problem; see Point III *infra*.

[12] Courts that have examined the statutory evidence have agreed. *See Beckham* v. *New York City Housing Authority*, 755 F.2d 1074, 1077 (2nd Cir. 1985) ("The rent limits set forth in the Brooke Amendment . . . stand in sharp contrast to the finding statute interpreted in *Pennhurst*"). *Beckham* resembles the great majority of federal cases in which public housing tenants were found to have an enforceable

missed the point that proper analysis would have demonstrated: the Brooke Amendment rent limits are not just a statutory afterthought but the very heart of the public housing program.

A. The Brooke Amendment Is The "Essential Feature" and "Backbone" Of The Public Housing Program.

Nationwide there are an estimated 1,270,761 units of public housing owned by 3,068 public housing agencies, with over 3 million tenants in residence.[13] This massive

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right in the Brooke Amendment, either with regard to rents themselves: *Bloom* v. *Niagara Falls Housing Authority*, 430 F.Supp. 1180 (W.D.N.Y. 1977); *Owens* v. *Housing Authority*, 394 F.Supp. 1267 (D.Conn. 1975); *Barber* v. *White*, 351 F.Supp. 1091 (D.Conn. 1972); or with regard to utility surcharge evasions of Brooke in implementing regulations: *Howard* v. *Pierce*, 738 F.2d 722 (6th Cir. 1984); *McGhee* v. *Housing Authority*, 543 F.Supp. 607 (M.D.Ala. 1982); *Nelson* v. *Greater Gadsden Housing Authority*, 606 F.Supp. 948 (N.D.Ala. 1985), *appeal pending*, No. 85-7320 (11th Cir.); *Norman* v. *Housing Authority*, C.A. No. 83V-6-N (M.D.Ala. May 18, 1984)*; *Hudson* v. *Concord Department of Housing*, Civil No. C-83-284S (M.D.N.C. March 14, 1984).* The only decisions, unreported, that question whether the Brooke Amendment gives tenants a substantive right are *Jackson* v. *Housing Authority*, No. 82-136 [CIV-Ft.M-17] (M.D.Fla. April 5, 1984),* *appeal dismissed for lack of final judgment*, 765 F.2d 152 (11th Cir. 1985); *Brown* v. *Housing Authority*, Civil No. CV 384-50 (S.D.Ga. December 12, 1984),* *appeal pending* No. 85-8186 (11th Cir.); and *Hill* v. *Ogburn*, No. TCA 84-7010-WS (N.D.Fla. July 24, 1984)* *appeal pending* No. ____ (11th Cir.). These three cases deserve no weight because of the utter lack of analysis they give the issue. *Stone* v. *District of Columbia*, 572 F.Supp. 976 (D.D.C. 1983), in which the court declined to imply a tenant right of action against PHA utility allowances, was settled on appeal when the housing authority admitted error, No. 83-1999, Order of June 15, 1984 (D.C. Cir.)* [Cases marked * have been lodged with the clerk for the convenience of the Court.]

[13] HUD FY 1986 Congressional Budget Justification, Exhibit to hearings before the Subcommittee of the Committee on Appropriations, House of Representatives, 99th Congress, 1st Session, on "Dept. of HUD—Independent Agencies Appropriation for 1986," Part V, p. T-5, (March 1985).

federal public housing program was created in 1937 "to assist the several States and their political subdivisions to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe and sanitary dwellings for families of low income in rural or urban communities." USHA, 50 Stat. 888, Ch. 896, § 2 (Sept. 1, 1937). The initial scheme called only for federal support for planning and construction. Local public housing authorities (PHAs) would raise money to build housing projects by issuing bonds, and the federal government would make annual payments to the PHAs in amounts adequate to meet the scheduled repayments of principal and interest (present 42 U.S.C. § 1437c(a)).

Local PHAs were given substantial leeway in operating and administering the projects: a 1959 amendment to USHA specified that

> it is the policy of the United States to vest in the local public housing agencies the maximum amount of responsibility in the administration of the low-rent housing program, including responsibility for the establishment of rents and eligibility requirements. . . .

Pub. L. 86-372, § 501, 73 Stat. 679 (1959) (now reflected as amended in 42 U.S.C. § 1437). Rents as set by the local PHAs were used to meet operating expenses. Only those families could be admitted whose income did not exceed five times the rent. This formula, reflecting the original § 1402(1), did not limit rent, but only limited family income for eligibility.[14]

This local discretion approach to public housing was dramatically altered in 1969 by the Brooke Amendment.

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[14] A family could be admitted, for instance, if their income was only twice the rent set by the PHA. It is less clear that a family of such low income could afford to pay half their income for rent.

Concerned that local PHAs were setting rents too high for low income families to be served, Congress adopted Senator Brooke's bill to limit public housing tenant rents which could be charged by PHAs to one-fourth of the family's income. Pub. L. No. 91-152, Title II Sec. 213(a), 83 Stat. 389 (1969) (now reflected as amended in 42 U.S.C. § 1437a(a)). To meet the resulting deficit in local PHA operating expenses, Congress adopted at the same time a system of operating subsidies to local PHAs. Under an annual contributions contract ("ACC") with HUD, the local PHA was to be reimbursed for the difference between the costs of operation and the amount collected from the tenants for rent. Pub. L. 91-152, Title II, § 212, 83 Stat. 389 (1969) (now reflected in 42 U.S.C. § 1437g). Thus the Brooke Amendment became the "essential feature" and "the backbone" of the entire public housing program, *Howard v. Pierce*, 738 F.2d 722, 728, 730 (6th Cir. 1984).

The resulting federal subsidy scheme is significantly different from federal assistance programs such as Aid to Families with Dependent Children and Medicaid. The basic public housing program does *not* involve the states themselves, except insofar as they may legislate authority for the establishment of local PHAs. *No* state or local public funds are involved. The funding comes entirely from tenant rents and federal payments.

While some local discretion is still exercised by PHAs, that discretion must now be "consistent with the objectives of this Act," 42 U.S.C. § 1437, and no longer extends to the establishment of rents or income limits (*compare* 42 U.S.C. § 1437a(a) and (b)(2) *with* 42 U.S.C. § 1437a(1) prior to the 1981 revision of USHA). Besides the statutory prescriptions for rent and income, PHA discretion is also constrained by required standards for leases, 42 U.S.C. § 1437d(1), and mandated maintenance of an administrative grievance procedure, 42 U.S.C.

§ 1437d(k). In addition, local PHAs are subject to the terms of their annual contributions contract with HUD, 42 U.S.C. § 1437d, and to regulations promulgated by HUD under USHA, 42 U.S.C. § 1408.

B. The History Of The Brooke Amendment Manifests Congressional Intent To Vest Public Housing Tenants With A Substantive Right To Limited Rents.

The Brooke Amendment now appears within 42 U.S.C. § 1437a(a) of the United States Housing Act as follows:

> (a) Dwelling units assisted under this Act shall be rented only to families who are lower income families at the time of their initial occupancy of such units. A family shall pay as rent for a dwelling unit assisted under this Act . . . the highest of the following amounts, rounded to the nearest dollar:
>
> (1) 30 per centum of the family's monthly adjusted income;
>
> (2) 10 per centum of the family's monthly income; or
>
> (3) if the family is receiving payments for welfare assistance from a public agency and a part of such payments, adjusted in accordance with the family's actual housing costs, is specifically designated by such agency to meet the family's housing costs, the portion of such payments which is so designated.

While this present language also defines the extent of tenant duty to pay rent, the legislative history shows beyond doubt a primary focus upon the duty of the PHA to charge tenants no more than the permitted rent ceiling—giving tenants a corresponding right of great importance.

The original Brooke Amendment was added to USHA in 1969. As their operating costs rose, PHAs used their

statutory discretion to set higher and higher rents. The result was that income eligibility for tenants rose with the increase in PHA rent levels. Congress became concerned that "the neediest families had been excluded from the public housing program," S. REP. No. 91-392, 91st Cong. 1st Sess., 2, reprinted in [1969] U.S. CODE CONG. & AD. NEWS 1524, 1542, and "responded with the legal mandate that local housing authorities not attack their financial problems by shutting out the very poor," *Fletcher* v. *Housing Authority*, 491 F.2d 793, 803 (6th Cir. 1974).

Senators Brooke and McIntyre introduced S. 2761, which was later incorporated into the Committee Bill, S. 2864, and became § 213(a) of the Act, December 24, 1969, Pub.L. No. 91-152, Title II, 83 Stat. 389. The Brooke Amendment was a simple parenthetical addition to the definition of "low rent housing" in § 2(1) of USHA, 42 U.S.C. § 1402(1), of the phrase "(which may not exceed one-fourth of the family's income, as defined by the Secretary)." It was accompanied by a provision for operating subsidies to PHAs so that lower rents would be feasible. Pub.L. No. 91-152, Title II, § 212, 83 Stat. 389.

Congressional intent to vest rights specifically in the low-income tenants of public housing is unequivocally shown by frequent references in the enactment process. In the Senate report accompanying S. 2864, the Committee stated that "this section would enable families, regardless of how low their incomes are, to afford the rentals necessary to support project operating costs with no more than 25% of their income." S.REP. No. 91-392, 91st Cong., 1st Sess. 2 reprinted in [1969] U.S. CODE CONG. & AD. NEWS at 1542. When the Committee bill incorporating his amendment went to the Senate floor, Senator Brooke confirmed its purpose with this statement:

> This bill is embodied in § 211 of the present Act [S.2864, later § 213(a) of the Conference Report] and

> would provide additional rental assistance in behalf of very low-income tenants of public housing projects. Thus, rental assistance payments would be available with respect to public housing and leased housing units to enable families of very low-income to afford rentals with no more than 25% of their incomes. . . . We believe that no public housing tenant should pay more than 25% of their income for housing. . . . I anticipate that these funds will be adequate to ensure that no public housing tenants pay more than 25% of their income for housing.

115 CONG. REC. 26721 (1969). Conference with the House of Representatives retained the concept. *See* CONF. REP. No. 91-740, 91st Cong. 1st Sess. 2 reprinted in [1969] U.S. CODE CONG. & AD NEWS 1079, 1582 ("The Conference substitute retains the basic concept of § 211 of the Senate Bill by generally limiting rents that may be charged public housing tenants to no more than 25% of their income").

As thus modified by the Brooke Amendment, USHA then read this way (at 42 U.S.C. § 1402(1), Brooke language emphasized):

> When used in this Act—
>
> (1) **Low-rent housing.** The term "low-rent housing" means decent, safe, and sanitary dwellings within the financial reach of families of low income, and developed and administered to promote serviceability, efficiency, economy, and stability, and embraces all necessary appurtenances thereto. The dwellings in low-rent housing shall be available solely for families of low income. Except as otherwise provided in this section, income limits for occupancy and rents *(which may not exceed one-fourth of the family's income, as defined by the Secretary)* shall be fixed by the public housing agency and approved by the Secretary.

Within the framework of this section, which reserves substantial PHA discretion over income limits and rents and HUD definitional discretion, the Brooke language

stands out as a concrete and specific mandate, not subject to anyone's discretion. There is nothing aspirational or hortatory about the standard, *compare Pennhurst*, 451 U.S. at 15-24; *Perry*, 664 F.2d at 1217. Congress' absolute intention that the rent limits constitute an operative mandate is shown by the accompanying § 213(b) of Brooke in the 1969 Act which sets an effective date specifically for the rent limits.

There is no ambiguity about who is to benefit from Brooke: "low-income tenants are the unmistakable focus of the Brooke Amendment," *Howard* v. *Pierce*, 738 F.2d at 727. The PHAs, the communities in which they are located, and the public at large do not benefit from the rent limitations, as they may from USHA generally, *Perry*, 664 F.2d at 1213, or from other provisions, *Phelps*, 742 F.2d at 822. Also in contrast to *Pennhurst*, Congress has backed up its Brooke Amendment mandate with substantial funding to cover the operating deficit which PHAs would otherwise suffer.

Through sixteen years and five amendments, the Brooke Amendment has retained its mandatory and specific character. In 1970, § 208(a) of Pub.L. No. 91-609, Title II, 84 Stat. 1770, 1778, set forth a statutory definition of income "for the purpose of establishing maximum rentals in public housing projects at one-fourth of tenant income," thereby reducing HUD's discretion over that definition. *See* CONF. REP. NO. 91-1784 91st Cong., 2nd Sess. reprinted in [1970] U.S. CODE CONG. & AD NEWS 5672, 5676. In 1971, Congress enacted a provision (Pub.L. No. 92-213, § 9, 85 Stat. 775) to ensure that public housing tenants receiving welfare assistance received the benefit of reduced rents under Brooke. *See* CONF. REP. NO. 92-727, 92nd Cong., 1st Sess. reprinted in [1971] U.S. CODE CONG. & AD NEWS 2324, 2326.

In 1974, Congress established a minimum rent provision and reworded and recodified the statutory rent lim-

itation. Pub.L. No. 93-383, Title II, § 201(a), 88 Stat. 654, then codified at 42 U.S.C. § 1437a(1). The 1974 Act for the first time stated the rent limitation in a separate sentence: "The rental for any dwelling unit shall not exceed one-fourth of the family's income as defined by the Secretary." The language of the Act originated in the Senate bill, S.3066, and the Senate Report accompanying the legislation described it as follows: "The rent fixed by a PHA could not exceed one-fourth of a low-income family's income, as under existing law. . . ." S.REP. NO. 93-693 93rd Cong., 2nd Sess. at 608, [1974] U.S. CODE CONG. & AD NEWS 4237, 4310. The 1974 legislation also established a welfare rent provision for states that adjusted the shelter component of the welfare grant in accordance with the tenant's actual housing costs.

In 1979, Congress again changed the language of the statutory rent limitation. Pub.L. No. 96-153, Title II, § 202, 93 Stat. 1106. Section 202 amended § 3(1) of the United States Housing Act of 1937 by striking out the language enacted in 1974 and inserting the following: "The rental for a dwelling unit shall not exceed . . . 25 per centum of family income in the case of a very low-income family or, in the case of other families, 30 per centum of such income." This provision of the Act came from the House bill, H.R. 3875. The House Report accompanying the Committee bill noted that "[t]he bill increases the maximum tenant contribution to rent for families with incomes above 50 percent of median from 25 percent of adjusted income to 30 percent." H.R. REP. NO. 96-154 96th Cong., 1st Sess. at 16, *reprinted at* [1979] U.S. CODE CONG. & AD NEWS 2317, 2331. While HUD never implemented this statutory change (*see* 47 Fed. Reg. 75955 (1982)), the language of the statutory provision and the Committee Report again clearly indicate that the statute provides tenants with a substantive right to limited rents.

Finally, in 1981, Congress enacted the current version of the statutory rent limitation. Pub.L. No. 97-35, § 322(a),

95 Stat. 404. As noted in the Senate Report describing a provision of the Senate bill almost identical to that which was ultimately enacted, "the revised method for determining family rental payments specifies that a family shall pay the highest of the following amounts:. . . ." S.REP. NO. 97-139, 97th Cong., 1st Sess. at 252, *reprinted at* [1981] U.S. CODE CONG. & AD NEWS 548. *See also* H. CONF. REP. NO. 97-208, 97th Cong., 1st Sess. 688, [1981] U.S. CODE CONG. & AD NEWS at 1046.

In summary, the legislative amendments since 1969 maintained for tenants a concrete and specific right to a statutory rent limitation, and increasingly focused upon the tenants as beneficiaries by removing from the definition of that right any reference to the role of the PHA or HUD in fixing rental levels. Although the rent limit now functions as a fixed rent rather than a maximum, there has been no retraction of the clear substantive right of tenants to limited rent. The Brooke Amendment remains the backbone of the public housing program.

C. The HUD Utility Allowance Regulations Of 1980 Implemented The Brooke Amendment With Mandatory And Specific Standards Which Refine The Tenants' Rights To Limited Rents.

The Brooke Amendment itself speaks only of rents; it does not by its terms specifically limit utility charges, nor for that matter parking fees, appliance rentals, maintenance charges or any of the varied fees and charges that could be imposed by an ingenious PHA to circumvent the Brooke limits. It is clear that Congress intended that all such related charges be covered. Congress itself included "the value or cost to [tenant families] of heat, light, water and cooking fuel" in the concept of "rental" in the original USHA, ch. 896, § 2, 50 Stat. 888 (Sept. 1, 1937), later "the value or cost to them of water, electricity, gas, other heating and cooking fuels and other utilities," in 42

U.S.C. § 1402(1) prior to 1959 amendments placing more definitional authority in the Secretary. Congress has continued to define "public housing" to include "all necessary appurtenances thereto," 42 U.S.C. § 1437a(b) (1).

Pursuant to its general regulatory authority, HUD has historically considered "rent" in the public housing program to cover not only shelter cost but also a reasonable amount of utilities. *See* HUD comment to proposed regulations, 49 Fed. Reg. 31400 (1984). At the time this suit commenced, the Secretary of HUD defined "contract rent" at 24 C.F.R. § 860.403(a) (1984) to include:

> . . . the rent charged a tenant for the use of the dwelling accomodation and equipment . . . services, and reasonable amounts of utilities determined in accordance with the PHA's schedule of allowances for utilities supplied by the project. Contract rent does not include charges for utility consumption in excess of the public housing agency's schedule of allowances for utility consumption. . . .

Where as here the PHA supplied utilities, the "contract rent" was the same as the "gross rent" defined at 24 C.F.R. § 860.403(i). The regulations then provided in relevant part:

> § 860.405. Maximum gross rent to income ratio. . . . [T]he rent for any dwelling unit shall not exceed one quarter (25%) of family income as defined in this subpart.

The effect of these sections was that the 25% of income which a tenant was to pay the PHA as rent was to include a reasonable utility allowance. While the PHA could impose additional charges for "excessive" consumption, a charge for any part of a "reasonable utility allowance" would violate the limits established by the Brooke Amendment.

For calculation of allowances by PHAs, HUD had furnished guidance as far back as 1963, in its LOCAL HOUSING MANAGEMENT HANDBOOK, Part II, Section 9. A more formal approach was signaled by HUD's publication of an interim rule, 45 Fed. Reg. 59502 (1980), to establish mandatory standards by regulation. This interim rule contains the regulations upon which the present tenants rely in this suit, namely 24 C.F.R. §§ 865.470 to .482, "Tenant Allowances for Utilities" (full text in statutory appendix at SA4).

This Court has specifically recognized that HUD regulations have mandatory and binding legal effect on PHAs, *Thorpe* v. *Housing Authority*, 393 U.S. 268, 274-76 (1969). The HUD Tenant Utility Allowance rule had all the substantive and procedural characteristics of such a binding regulation, and indeed the Authority has not denied that the rule was both valid and binding. HUD's explanatory comments to the interim rule stated that it "will alleviate confusion and controversy arising under the HUD Guide by establishing mandatory standards and procedures applicable to all PHAs," 45 Fed. Reg. 59502 (1980). The regulations themselves were couched in mandatory language. 24 C.F.R. § 865.473, "Establishment of allowances by PHAs," begins: "(a) Basic *Requirement. PHAs shall establish* (1) allowances for PHA furnished utilities . . . [emphasis added]." "Shall" remains the operative word throughout the regulations. 24 C.F.R. § 865.482 concludes that "PHAs shall proceed to accomplish these results [establishment of allowances] as promptly as possible, but shall establish such allowances effective as of a date no later than 120 days from the effective date of this rule or extended date, if approved by HUD."

The requirements of the allowance regulations are also specific. "These regulations . . . are clear and unambiguous," *Norman* v. *Housing Authority* at p. 9. The combination of PHA consumption data with the formulas of § 865.477 and § 865.480 would have produced the

required allowances, with revisions as needed, had the Authority not chosen to disregard the requirement.

A focus upon the tenant families is also apparent from the relation of the allowance rule to the Brooke Amendment rent limits, and from key wording in the regulations themselves. The relation to Brooke is acknowledged by the familiar inclusion of all components of shelter within the rule's rental definitions, § 865.472, and the inclusion of resulting allowances in the rent schedules, § 865.473(a). The tenants as beneficiaries are to be given notice of proposed allowances, with opportunity to comment, *id.*, and notice of equipment included so that they may keep within the allowances, § 865.473(b). The past tenant consumption pattern is the basis for the allowances, § 865.476, and allowances must be set to meet the needs of 90% of the families in each size unit, § 865.477. Individual tenants may obtain relief from surcharges in certain equitable situations, § 865.481. Perhaps most telling is the HUD justification for early implementation of the interim rule: an urgent need to revise allowances "before the coldest months of winter" to "alleviate tenant hardship," 45 Fed. Reg. 59505 (1980).[15]

The allowance regulations thus have the force and effect of law,[16] implementing and detailing the substantive rights of tenants under the Brooke Amendment from which the regulations derive. They are completely consistent with and even necessary to their statutory source,

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[15] An ancillary purpose of the rule is energy savings, 45 Fed. Reg. 59504, but HUD acknowledged the weakness of its rule to achieve conservation where the PHA furnishes utilities. *Id.* The Brooke purpose obviously predominates; otherwise the rule would set a much lower threshhold for surcharges.

[16] *See generally Chrysler Corp.* v. *Brown*, 441 U.S. 281, 301-03 (1979); *Batterton* v. *Francis*, 432 U.S. 416, 425 n. 9 (1977); *Morton* v. *Ruiz*, 415 U.S. 199, 235 (1974).

and furnish the precise standard by which the statute should be enforced. *Cf. Guardians Ass'n* v. *Civil Service Comm'n*, 463 U.S. 582, 591-92 (1983) (opinion by White, J.); *Samuels* v. *District of Columbia*, 770 F.2d 184, 199 (D.C. Cir. 1985).

In short, both the Brooke Amendment and its implementing regulations regarding utility allowances establish that tenants have "rights . . . secured by the federal . . . laws," § 1983. The test of *Pennhurst* is met. The clear intent of Congress, solidly preserved through years of statutory amendment, funding crisis and HUD reorganization, should be vindicated. This suit is the appropriate vehicle for such vindication.

II. THE DISPOSITION BELOW ERRONEOUSLY REDUCES THE AVAILABILITY OF THE § 1983 REMEDY TO CASES WHERE A PRIVATE RIGHT OF ACTION CAN BE IMPLIED FROM A FEDERAL STATUTE.

A. The Decisions Below Illustrate A Common Confusion Among The Lower Courts In The Relation Of § 1983 And Implied Rights.

The intersection of *Thiboutot*, *Pennhurst*, *Sea Clammers*, and *Cort* v. *Ash* is crowded with commentators decrying the confusion around them.[17] They could find no better illustration of that confusion than this case.

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[17] *See e.g.* Brown, "Whither *Thiboutot:* Section 1983, Private Enforcement, and the Damages Dilemma," 33 DE PAUL L. REV. 31 (1983); Sunstein, "Section 1983 and the Private Enforcement of Federal Law," 49 U.CHI.L.REV. 394 (1982); Wartelle & Louden, "Private Enforcement of Federal Statutes: The Role of the Section 1983 Remedy," 9 HASTINGS CONST. L.Q. 487 (1982); Note, "Preclusion of § 1983 Causes of Action by Comprehensive Statutory Remedial Schemes," 82 COLUM.L.REV. 1183 (1982); Note, "Implied Private Rights of Action and Section 1983: Congressional Intent through a Glass Darkly," 23 B.C.L.REV. 1439 (1982).

The confusion is most evident in the opinion of the district court, which read one of the Fourth Circuit's previous treatments of this issue to hold explicitly that no cause of action will lie under § 1983 where no right of action may be implied form the substantive statute. JA27-28, citing *Home Health Services* v. *Currie*, 706 F.2d 497, 498 (4th Cir. 1983).

The Fourth Circuit opinion perpetuates this error in several respects. First, the panel persists in making a *Cort* v. *Ash* analysis (JA38, n.9) although the tenants have expressly and consistently disclaimed any reliance on that approach. Second, the Fourth Circuit continues to minimize the difference between the implied rights analysis and the review of § 1983 exceptions. "The inquiry under either interpretation of the appellant's position is similar, though not perfectly congruent." JA38, n.9, quoting *Phelps*. Even the concurring opinion, which tries to restore some distinction to the two analytic frameworks, emphasizes instead their similarity: "distinctions exist, however fine" (JA41); "in many instances this would be a distinction without a difference" (JA41); "the two are distinct, however subtly" (JA44).

The inquiry most affected by the Fourth Circuit's convergence of doctrine is with regard to the preclusion of a private tenant remedy. For both the § 1983 *Sea Clammers* inquiry and the implied rights inquiry the court identifies its initial finding as the absence of a statutory private remedy (compare JA35, quoting from *Phelps* v. *Housing Authority* with JA39, n.9). While this evidence may tend to support a finding of no congressional intent to permit private suits implied from the statute, it should have the *opposite* effect in the *Sea Clammers* inquiry: if no alternative private remedy exists, then Congress likely intended § 1983 to have full play. The opinion does not recognize any such distinction, but gives the lack-of-express-remedy evidence the same effect in both inquiries.

This approach is terribly wrong. True, both *Sea Clammers* and *Cort* v. *Ash* require inquiry into congressional intent to permit or preclude remedies. But in a case such as this, where congressional evidence regarding remedies is slim, *Sea Clammers* and *Cort* v. *Ash* should produce dramatically different results. Unless there is an adequate alternative private remedy or comprehensive enforcement scheme in the statute *Sea Clammers* would permit the customary private enforcement by § 1983. Not so under *Cort* v. *Ash*, where absence of explicit congressional intent simply moves the inquiry to other factors, with the burden upon the proponent of the implied right. *Cannon* v. *University of Chicago*, 441 U.S. 677, 688 (1979). These are critical, not subtle, differences. Failure to recognize them inevitably has the effect, as in this case, of reducing the § 1983 shield of the citizen to a redundancy, and overruling *Thiboutot* by implication.

Despite its devastating effect on § 1983, the convergence of the preclusion tests represents one pattern of lower court response to the intersection of *Thiboutot* and *Cort* v. *Ash*.[18] Another pattern of response is extreme divergence—if an implied right of action is found, these courts find that § 1983 is precluded.[19] Still a third

[18] In addition to the district court's opinion in this case *see e.g. Moxley* v. *Vernot*, 555 F.Supp. 554, 559-60 (S.D. Ohio 1982), *cert. denied* 103 S.Ct. 3112 (1983) (lack of implied cause of action under Rehabilitation Act of 1973 bars private action under § 1983). *Cf. Meyerson* v. *Arizona*, 709 F.2d 1235, 1239-40 (9th Cir. 1983) *vacated* 104 S.Ct. 1584, *remanded* 740 F.2d 648 (1984) (concludes private action under § 503 of Rehabilitation Act of 1973 barred whether under implied or under § 1983, on the same limited intent evidence, despite a difference in proof burdens).

[19] *E.g. Longoria* v. *Harris*, 554 F.Supp. 102, 107 (S.D. Tex. 1982) (implied right of action under § 504 of Rehabilitation Act of 1973 precludes § 1983 damages action); *Manecke* v. *School Bd.*, 553 F.Supp. 787, 797 (M.D.Fla. 1982), *reversed* 762 F.2d 912 (11th Cir. 1985) (court has implied equitable remedy under § 504 of same act and this precludes § 1983 damages remedy); *Garrity* v. *Gallen*, 522 F.Supp. 171, 203 (D.N.H.1981).

approach entertains a strong presumption that § 1983 is available in the absence of clear evidence of congressional intent to the contrary.[20] Petitioners believe this last approach best reflects the reasoning of this Court in *Thiboutot*, *Pennhurst*, and *Sea Clammers*.

B. The Proper Approach To The Preclusion Inquiry Is A Presumption That The § 1983 Right Of Action May Be Used To Vindicate Federal Rights.

The most persuasive harmonizing of this Court's § 1983 and implied rights cases is effected by presuming that Congress intended to preserve the § 1983 remedy for enforcement of a federal statute. Such a presumption places the burden on a § 1983 defendant to show that Congress addressed the issue and decided otherwise. It appears from relevant opinions that this view is shared by a majority of the court.

The first is *Sea Clammers* itself. Justice Powell's majority opinion held that the comprehensive judicial remedies under the environmental acts in question demonstrate congressional intent to preclude a § 1983 remedy. Important, however, is Justice Powell's comment that "we do not suggest that the burden is on a plaintiff to demonstrate

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[20] *E.g. Samuels* v. *District of Columbia*, 770 F.2d 184, 195, 194 n.7 (D.C. Cir. 1985) (Section 1983 enforcement of grievance mechanism in USHA presumed to be available in absence of showing that Congress affirmatively intended to foreclose enforcement); *Ryans* v. *New Jersey Comm'n for the Blind*, 542 F.Supp 841, 846-49 (D.N.J. 1982) (Even though no implied right of action exists "The court must presume a § 1983 right of action to exist unless there is evidence in the underlying statute which suggests an intent on the part of Congress to *foreclose* such an action") (emphasis in original); *Boatowners and Tenants Ass'n* v. *Port of Seattle*, 716 F.2d 669, 674 (9th Cir. 1983) (Plaintiff must prove congressional intent to create private right of action when suing directly under the federal statute but not when suing under § 1983).

congressional intent to preserve § 1983 remedies." 453 U.S. at 451, n.31.

Justice Stevens, joined by Justice Blackmun, disagreed on the preclusion treatment in a footnote that remains the most succinct statement of the presumption:

> As the Court formulates the inquiry, the burden is placed on the § 1983 plaintiff to show an explicit or implicit congressional intention that violations of the substantive statute at issue be redressed in private § 1983 actions. The correct formulation, however, places the burden on the defendant to show that Congress intended to foreclose access to the § 1983 remedy as a means of enforcing the substantive statute. Because the § 1983 plaintiff is invoking an express private remedy that is, on its face, applicable any time a violation of a federal statute is alleged, see *Maine* v. *Thiboutot*. . . , the burden is properly placed on the defendant to show that Congress, in enacting the particular substantive statute at issue, intended an exception to the general rule of § 1983. A defendant may carry this burden by identifying express statutory language or legislative history revealing Congress' intent to foreclose the § 1983 remedy, or by establishing that Congress intended that the remedies provided in the substantive statute itself be exclusive.

453 U.S. at 27-28 n. 11. The preceding comment of Justice Powell suggests that the majority did not reject this analysis, but rather considered it inapposite to their disposition.

A similar approach was taken by Justice White (joined by Justices Brennan and Marshall), dissenting from the *Pennhurst* holding that the Developmentally Disabled Act created no rights. Assuming that the Act created rights in the plaintiffs, these justices viewed *Thiboutot* as creating "a presumption that a federal statute creating federal rights may be enforced in a § 1983 action," 451 U.S. at 51. The Court should not foreclose a remedy for

those most effected by the program, regardless of the agency's administrative enforcement remedies. *Id.* This view was not at odds with the opinion of the *Pennhurst* majority because the issue was not reached by the majority.

More recently Justice Blackmun, writing for the majority in *Smith* v. *Robinson*, 104 S.Ct. 3457 (1984), also used language supporting a presumption analysis. Speaking to the issue of preclusion of § 1983 remedies, he wrote that "we do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for a substantial equal protection claim," 104 S.Ct. at 3469. Presumably, since *Thiboutot*, that conclusion may not be reached lightly with regard to statutory rights either.

These opinions recognize that the task of the courts is not simply to look at the substantive federal statute for evidence of congressional intent, but rather to read that evidence against the clear intent of Congress expressed in § 1983 to permit private enforcement. Since repeal of statutes by implication is disfavored, a clear statement of intent would be expected if a legislature intended to extinguish the prior remedy, *TVA* v. *Hill*, 437 U.S. 153, 189-93 (1978).

It is to be expected that § 1983 liability will represent some hinderance and bother to governmental officials. Evidence to that effect should not necessarily be persuasive to preclude a § 1983 remedy, however, because of the history and purposes of § 1983 itself. The Court has repeatedly noted that § 1983 was expressly created to alter federal-state relations by creating a special remedy for state and municipal violation of federal law. Congress fashioned the remedy to "interpose the federal courts between the states and the people, as guardians of the people's federal rights." *Mitchum* v. *Foster*, 407 U.S. 225, 242 (1972). *See generally* Blackmun, "Section 1983 and

Federal Protection of Individual Rights," 60 N.Y.U.L. Rev. 1 (1985). A presumption in favor of the § 1983 plaintiff achieves these historic congressional purposes while leaving the courts some flexibility in individual cases.

Several courts of appeals have found this Court's presumption statements a useful key to reconciling *Thiboutot* and *Cort* v. *Ash*. *Samuels* v. *District of Columbia*, 770 F.2d 184 (D.C. Cir. 1985) (effect of presumption is that § 1983 plaintiffs do not suffer burden of demonstrating congressional intent to preserve private remedy against PHA under USHA); *Keaukaha-Panaewa Community Ass'n* v. *Hawaiian Homes Comm'n*, 739 F.2d 1467, 1470-71 (9th Cir. 1984) (burden on implied rights plaintiff to show congressional intent to create a cause of action; presumption sets burden on governmental § 1983 defendant to show congressional intent that statutory remedy is exclusive); *Boatowners & Tenants Ass'n* v. *Port of Seattle*, 716 F.2d 669, 674 (9th Cir. 1983) (plaintiff with statutory right presumed to have § 1983 right of action, burden on defendant to show preclusion; implied right works the other way). A presumption approach is also strongly urged by scholars,[21] even those critical of the breadth of *Thiboutot*.[22]

Recognition of the presumption in this case would have eliminated the serious confusion between implied rights and § 1983 in the district court, and made clear to the court that it need not address the *Cort* v. *Ash* tests where an implied right is not asserted. In the court of appeals the presumption would have eliminated the court's emphasis on the similarity of the tests, and shifted the

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[21] Wartelle and Louden, "Private Enforcement" *supra* n. 17, at 541; Sunstein, "Section 1983" *supra* n. 17 at 424-25; Note, "Implied Private Rights of Action" *supra* n. 17 at 1469; Note, "Preclusion of Section 1983 Causes" *supra* n. 17 at 1200-01.

[22] Brown, "Whither *Thiboutot?*" *supra* n. 17 at 45.

consequences of congressional silence on remedies. The result, however, would still depend upon an examination of congressional intent such as that which follows.

III. THE AUTHORITY HAS NOT MET ITS BURDEN OF SHOWING CONGRESSIONAL INTENT TO OVERCOME THE PRESUMPTION THAT § 1983 MAY BE USED FOR PRIVATE ENFORCEMENT OF USHA.

The availability of § 1983 under *Thiboutot* to enforce federal statutory rights is subject to the exception articulated in *Sea Clammers* when a § 1983 defendant can show that Congress has foreclosed § 1983 enforcement in the statutory scheme itself. "When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983," 453 U.S. at 20.

It appears to be the *Sea Clammers* exception which the court of appeals found most compelling to disposition in this case. After citing generously from *Phelps* (JA35-36) the court concluded (JA37):

> The § 1437 right is simply incompatible with the § 1983 remedy, for a characteristic of the § 1437 right is precisely that the plaintiffs are not to have the authority themselves to sue. HUD alone may, as quasi trustee, take legal action, for the right is explicitly tailored not to allow the beneficiaries, the low cost housing tenants, to do so.

Again, however, the Fourth Circuit offered little reasoning to back its sweeping conclusion. It made no examination of the particular nature or history of the Brooke Amendment. It simply reviewed its former decisions in *Perry* and *Phelps* and found them to support a much broader preclusion than they purported to announce (JA35-37). The effect of this cavalier treatment is to bar a massive class of tenants from action to enforce not only

the Brooke Amendment, but *any* federal statutory right in the public housing program. This result is plainly wrong, as a more precise *Sea Clammers* analysis will show.[23]

A. Congress Did Not Expressly Preclude Private § 1983 Enforcement.

Neither the Brooke Amendment in particular nor the Housing Act of 1937 in general contain any express preclusion of private enforcement. The legislative history of the Brooke Amendment contains no explicit expression of such intent.[24] Although many § 1983 tenant suits have been brought and reported concerning the Brooke Amendment and other portions of USHA in the sixteen

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[23] Courts seriously considering whether § 1983 is precluded for enforcement of the Brooke Amendment have agreed with petitioners. The Second Circuit found a § 1983 challenge to PHA rent calculations not precluded because the Brooke Amendment "contains no comprehensive enforcement mechanism to enforce statutory rent limitations," *Beckham* v. *New York City Housing Authority*, 755 F.2d at 1077. Likewise in *McGhee* v. *Housing Authority*, 543 F.Supp. at 609, the court found "no scheme in [the Brooke Amendment and other housing statutes] which appears to be set up for the purpose of enforcing private rights of any kind." *Cf. Samuels* v. *District of Columbia*, 770 F.2d at 195-96 (§ 1983 not precluded to enforce grievance procedure requirement of USHA against PHA); *Pietroniero* v. *Oceanport*, 764 F.2d 976, 980 (3rd Cir. 1985), *cert. denied* ____ *U.S.* ____ *(§ 1983 not precluded to enforce various housing and relocation acts against municipality).* By contrast, the only decision which finds § 1983 precluded for private Brooke Amendment enforcement stands *Sea Clammers* on its head: in *Jackson* v. *Housing Authority*, order at pp. 3-4, the court denies § 1983 *because* USHA does not create a private right of action.

[24] *Howard* v. *Pierce*, 738 F.2d at 729 (Sixth Circuit finds no intent in USHA to preclude private enforcement of Brooke: "we cannot assume that legislative silence in an act which provides no elaborate enforcement provisions indicates a congressional intent to preclude enforcement of every substantive provision.")

years of congressional tinkering with Brooke, Congress has not seen fit to disown them.

The one modest exception proves the rule. In the Omnibus Budget Reconciliation Act of 1981, Congress authorized an increase in the public housing and assisted housing limits from 25% of tenant income to 30%. In order to avoid hardship to tenants, lease violation, or impracticability in implementation, Congress gave the Secretary of HUD the authority for delayed or staged implementation. The Act specifically provided that "the Secretary's actions and determinations and the procedures for making determinations pursuant to this subsection shall not be reviewable in any court." Pub.L. No. 97-35, Title III, § 322(i)(3), 95 Stat. 358, 404 (Aug. 13, 1981). This specific preclusion of judicial intervention was repealed two years later. Pub.L. No. 98-181, Title II, § 206(e), 97 Stat. 1153, 1181 (Nov. 30, 1983).

This specific and temporary preclusion shows that with regard to public housing rent limits, Congress has duly considered private actions brought to enforce or challenge portions of the Act. Congress closed the door briefly and then reopened it; open should it remain.

B. Congress Did Not Supplant § 1983 With Alternate Private Remedies.

Critical to the § 1983 preclusion of *Sea Clammers* was the existence of a multitude of express private remedies in the statutes which plaintiffs sought to enforce. 453 U.S. 1, 20-21. *See also Smith* v. *Robinson*, 104 S.Ct. at 3457 (express private remedy in the Education of the Handicapped Act demonstrates congressional intent to supplant § 1983 remedy).

The respondent Authority has repeatedly urged that the tenant administrative grievance mechanism mandated by USHA at 42 U.S.C. § 1437d(k) is an enforcement

vehicle intended by Congress to supplant § 1983. The Fourth Circuit did not mention this possibility, for good reason. The grievance procedure is a system for complaint to the local PHA management, and ultimately to a local grievance panel, but never to HUD. The grievance procedure was not required by USHA until a 1983 amendment, Pub.L. No. 98-181, § 204, 97 Stat. 1153, 1178 (Nov. 30, 1983), some 14 years after the Brooke Amendment was passed. The purpose was not to cut off other remedies, but simply to prevent HUD from scuttling a useful procedure that had existed under regulations for many years. *Samuels* v. *District of Columbia*, 770 F.2d at 197-98. In addition, the grievance mechanism elaborated in HUD regulations may only be used for individual complaints, not class objections to policy, 24 C.F.R. § 966.53(a), § 966.51(b) (1985). In explanatory comments upon its revision of the utilities allowance regulations, HUD itself notes that the grievance mechanism is not available for challenges to the general utility allowance schedules. 49 Fed. Reg. 31399, 31407 (1984).[25] *See also McGhee* v. *Housing Authority*, 543 F.Supp. at 609 (grievance procedure "does not in any way affect the determination of whether Congress intended for tenants to further air such grievances in the federal courts").

Neither the Brooke Amendment nor USHA generally provide *any* private judicial or administrative remedy which might have been available to the present tenants as

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[25] Even less convincing is the district court's reasoning (JA25-26) that Congress showed its intent to preclude by the administrative remedy of 24 C.F.R. § 865.481 (1983). This portion of the utility allowance regulation (SA12 to this brief) affords a tenant with a defective meter the opportunity for relief from surcharges. It may help a tenant with a defective utility meter; it assuredly would not help a tenant with a defective utility allowance. This provision bears as remote a relation to the "comprehensive remedial scheme" contemplated by *Sea Clammers* as it does to the intent of Congress.

an alternative to § 1983. There is simply none of the evidence of congressional intent to supplant required by this Court in *Sea Clammers* or by the presumption test urged by Justice Stevens in that case. While purporting to rely upon the *Sea Clammers* test, the Fourth Circuit's opinion fails even to discuss the total absence of an alternate private remedy. Whether this Court uses a presumption approach or not, the absence of any express private enforcement scheme shows that § 1983 actions are permitted.

C. Congress' Grant Of General Regulatory Authority To HUD Does Not Demonstrate Intent To Supplant § 1983.

The only argument offered by the Fourth Circuit panel for preclusion derives from the general regulatory authority of HUD over the public housing program (JA35-36). Through its annual contributions contract, HUD can crack the whip and withhold further subsidies if a PHA violates USHA or HUD regulations (JA35). This argument fails to meet the standards of *Sea Clammers*, fails on the facts, and altogether disregards the particular nature of the Brooke Amendment.

First, the reasoning of *Sea Clammers* cannot be pushed so far. Justice Powell's opinion recognizes the Court is reconciling one express congressional authorization, § 1983, with the express remedial provisions of the environmental acts in question. 453 U.S. at 20. It is one thing to say that Congress has expressly supplanted its previous § 1983 legislation; it is quite another to say that the express mandate of § 1983 is implicitly overriden, just by virtue of a very generalized regulatory authority given to a federal agency. This Court has not gone so far, nor should it.

Second, the ACC on which the Fourth Circuit leans so heavily will not bear the weight. The Brooke Amendment is not located in that section of USHA describing those requirements HUD will enforce through contract provisions of the ACC, 42 U.S.C. § 1437d, but is instead located

in § 1437a. The ACC does bind the Authority to comply with USHA generally (§ 5, JA45), although compliance with HUD regulations is curiously omitted. HUD can indeed enforce the ACC by suit (§ 508, JA46) or by taking over the project in the event of substantial default (¶¶ 501, 502 of the ACC, in record with the 11-16-84 affidavit of Herbert R. McBride). But the withdrawal of subsidies, the "most drastic possible means" cited by the court of appeals, is specifically *barred* once a project is completed (§§ 504, 510). *See also* 42 U.S.C. § 1437g(a)(1) (requiring ACC to guarantee payment subject to availability of funds); *Ashton* v. *Pierce*, 723 F.2d 70 (D.C.Cir. 1983), *amending* 716 F.2d 56 (1983) (HUD withdrawal of funding not an available sanction). The administrative controls over public housing, in short, are not even as extensive as those in most other cooperative federal funding programs.

Finally, an exclusive HUD enforcement role is particularly inappropriate to the nature of the Brooke Amendment. HUD has a significant financial disincentive to enforce Brooke. The more that tenants pay towards the operating expenses of a PHA, the less that HUD will have to contribute to make up the difference. 24 C.F.R. § 990.110(d) (1985). The only players with a stake to lose by overcharges are the tenants themselves. If through illegal utilities surcharges or other Brooke violations the tenants pay too much, it is *their money* to be recovered, not the government's; who should have a better claim?[26]

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[26] This is the Achilles' heel of the Fourth Circuit's suggestion (JA36,37) that HUD is a "quasi-trustee" of public housing, with sole enforcement authority against third parties for the benefit of tenants. The analogy is inapt: whatever it says about the federal financial contribution, it says nothing about the rent paid by tenants themselves. Their leasehold is also property within their present entitlement. It could as well be said that the PHA is a co-trustee for benefit of the tenants. The analogy and case cited for it (*In re Romano*, 426 F.Supp. 1123, 1128 (N.D.Ill. 1977), *modified* 618 F.2d 109 (8th Cir. 1980) may describe the Fourth Circuit's result, but explain nothing.

The administrative enforcement argument assumes, of course, that there is some triggering mechanism for program beneficiaries such as the tenants to set HUD enforcement in motion. USHA establishes no procedure for tenants themselves to obtain an administrative review or enforcement remedy from HUD. HUD's regulations are similarly silent on this point. In the absence of some such avenue of petition for redress, a § 1983 preclusion would be particularly unfair,[27] and not likely to be the congressional intent. *Howard* v. *Pierce*, 738 F.2d at 729; *cf. Rosado* v. *Wyman*, 397 U.S. 397, 406 (1970); *Pietroniro* v. *Oceanport*, 764 F.2d 976, 980 (3rd Cir. 1985), *cert. denied* ___ U.S. ___ (1985).

Even if some administrative remedy did exist, that should not normally preclude recourse to § 1983. This Court has continued to hold that exhaustion of state administrative remedies is not a prerequisite to bringing a suit under § 1983, *Patsy* v. *Board of Regents*, 457 U.S. 496 (1982). It would create a bizarre anomaly if a § 1983 litigant were precluded by the same administrative remedy which he would not otherwise be required to exhaust.

D. HUD Does Not Assert The Exclusive Jurisdiction Over USHA That The Court Of Appeals Ascribes To It.

The Fourth Circuit would give HUD exclusive enforcement authority despite the absence of a "comprehensive

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[27] The futility of a HUD remedy without a tenant trigger is shown by this case. Counsel for tenants was asked at argument on appeal whether a tenant complaint had been made to HUD, and responded that a complaint had been made, but no answer of any kind received. The Fourth Circuit concluded from this that HUD declined to intervene. "HUD's decision presumably reflected an intricate economic 'shifting and weighing' process in which it assessed the utility of proceeding further on the tenants' behalf" (JA 36). The Fourth Circuit's conclusion is utterly without foundation in the record, and wholly specious. The only conclusion which can be drawn is that HUD does not acknowledge tenant complaints.

enforcement scheme" relating to the Brooke Amendment. This position is not only inconsistent with *Sea Clammers;* it is not the position taken by HUD itself.

In its last revision of utility allowance regulations, HUD initially proposed to limit tenant challenge to PHA allowances to state court review under an arbitrariness standard. 47 Fed. Reg. 35249, 35252 (1982). In the final rule, HUD abandoned this limitation, noting in its comments that "some plaintiffs may prefer to challenge PHA determinations in Federal rather than State Court and . . . the Department's power to preclude access to Federal Court is doubtful." 49 Fed. Reg. 31403 (1984). HUD has also given up its prior approval of utility allowances. *Compare* 24 C.F.R. § 865.473(a) (1982) with 24 C.F.R. § 965.473(d) (1985).

In a suit brought by tenants against HUD and a Georgia Housing Authority for non-compliance with the Brooke Amendment regarding utility allowances, HUD has taken the position that it has no statutory duty even to enforce the Brooke Amendment. "Not only does this [Brooke] Amendment, and indeed, the entire USHA, not 'command' HUD to enforce the limitations of the Act, it does not even suggest that HUD do so in permissive terms."[28] HUD took the same position on appeal of *Stone* v. *District of Columbia*. HUD agreed that Brooke bestowed a benefit only on tenants, and disavowed authority to ensure PHA compliance in setting rents or utility allowances.[29] *Cf. Ashton* v. *Pierce*, 716 F.2d 56, 66 (D.C.Cir. 1983) ("The Department has argued . . . that it

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[28] *Brown* v. *Housing Auth.*, No. 85-8186 (pending in 11th Cir.) brief filed July 15, 1985 for federal appellee Pierce, at p.24. [Relevant material lodged with the clerk of this Court].

[29] *Stone* v. *District of Columbia*, No. 83-1999 (D.C. Cir.) brief filed February 10, 1984 for federal appellees Pierce and White, pp. 39-41. [Lodged with the clerk].

has no legal duty to monitor or enforce the Authority's compliance with the [HUD lead paint] regulations").

This reluctant enforcement posture not only undercuts the disposition of this case below; it explains why tenants in housing projects around the country have been forced to seek redress in federal court (*see Brown*, *Stone*, and other cases collected at n. 12 *supra*). If the congressional mandate of Brooke is to be carried out, it will be because the courts, at least, see their duty clear.

E. Section 1983 Preclusion Is Not Required Because Of The Relief Sought By These Tenants.

The remaining tenant claim is for return of their payments for illegal rent surcharges. While this might be characterized as damages, it is really a form of restitution; either way, it is clearly within the scope of § 1983 relief. Where legal rights have been invaded and a cause of action is available a federal court may use any available remedy to afford full relief. *Bell* v. *Hood*, 327 U.S. 678, 684 (1946).

This is not a case where § 1983 relief is at odds with the remedial scheme of a particular statute sought to be enforced, *e.g. Smith* v. *Robinson*, 104 S.Ct. at 3464-65 (cannot maintain § 1983 suit just for § 1988 attorney fees when § 1983 action essentially duplicates statutory claim under Education of the Handicapped Act); *Guardians Ass'n* v. *Civil Service Comm'n*, 463 U.S. 582 (1983) (§ 1983 "make whole" remedies inconsistent with Title VI source of right, in absence of intentional discrimination.) In this case there is no alternative statutory remedy.

Here the damage remedy effectively serves the policy purposes of the Brooke Amendment and USHA. The respondent Authority did not sail into unknown waters with only a vague and aspirational federal chart to guide its course; both the Brooke Amendment and the HUD utility allowance regulations were clear in their mandatory nature and in their specific procedural and substantive requirements. The Authority knew what it was supposed to do, and obstinately refused to do it, fully aware that it was extracting preciously limited funds from families so poor that they could not risk their subsidized tenancy by complaining. This was intentional dereliction of exactly the sort that § 1983 was intended to redress.

Nor will redress by repayment impose any serious burden on the federal public housing program. The Authority has at least three ways to repay the illegal rent surcharges. To the extent that it has escrowed the disputed payments as agreed in the district court, those funds can return to the injured from whom they came. An attractive alternative would be granting of rent credits against future rent obligations for those tenants still residing in Authority projects. This adjustment in operating income can be offset with an adjusted claim for HUD operating subsidies, 24 C.F.R. § 990.110(d) (1985). Finally, the Authority could apply to HUD directly for funds needed to reimburse the tenants. The last avenue was the basis of settlement in *Stone* v. *District of Columbia*, No. 83-1999 (D.C. Cir., order entered June 15, 1984) (lodged with the clerk of this Court). In that case $1.9 million of additional subsidy was approved by HUD to refund illegal surcharges to public housing tenants in the District.

In a program where all the funds are either federal in source or come from the tenants themselves, the remedies of § 1983 are minimally intrusive on the federal relationship. They are essential, however, if either the will of Congress or the specific rights of program beneficiaries are to be respected.

IV. THE FEDERAL COURTS MUST ENTERTAIN A LEASE-BASED CLAIM WHICH UNAVOIDABLY RAISES A SUBSTANTIAL FEDERAL QUESTION UNDER THE HOUSING ACT OF 1937 AND IMPLEMENTING REGULATIONS.

For the second claim of their complaint (JA10), the tenants asserted that the failure of the Housing Authority

to furnish electrical utilities service reasonably necessary for lighting and general household appliances at no additional charge violated the Authority's obligation to the tenants under paragraph 4 of its standard lease. That paragraph provided as follows:

> Utilities: *Management Agent agrees to furnish at no charge to the Resident the following utilities as reasonably necessary: hot and cold water, gas for cooking, and electricity for lighting and general household appliances* and heat at appropriate times of the year, and also range and refrigerator. Resident will be required to pay for all excess consumption of utilities above the monthly allocated amount as developed by the Authority and determined by the individual check meter servicing the leased unit. The schedule of allocations and charges for excess consumption is posted on the bulletin board of each Housing Development office. [emphasis added]

The district court viewed this claim solely as an invocation of pendent jurisdiction, and in a footnote (JA28, n. 9) dismissed the claim under its discretion over pendent state claims recognized in *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966). The court of appeals affirmed this holding with little analysis, inquiring only whether the lease created a landlord-tenant relationship between the tenants and the Authority (JA34). If so, any tenant remedy under the lease was to be had in state court, under the Fourth Circuit's earlier decision in *Perry* (JA38).

In fact the lease claim was not simply a pendant state law claim, but instead a full-blown invocation of federal question jurisdiction[30] completely independent of the § 1983 right of action. By its erroneous dismissal, the

[30] 28 U.S.C. § 1331—Federal Question. The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.

Fourth Circuit implicitly reduced most contract cases concerning federal questions to a discretionary pendent jurisdiction status, contravening the standards recently set by this Court in *Franchise Tax Bd* v. *Construction Lab'rs Vacation Trust*, 463 U.S. 1 (1983).

A. The Lease Controversy Gives The Tenants A Right Of Action.

The tenants' claim on their lease is a classic contract right of action recognized in the common law, *see generally* 1 AM. JUR. 2d "Actions" § 2, § 8 (1962) and in Virginia, *see generally* 1A MICHIES JURIS. "Actions" §§ 8-11 (1980). Regardless of why the Housing Authority put the particular lease provision there, it creates a right personal to and enforceable by the tenants.

Federal courts, furthermore, recognize the state law-based right to sue on contract, when federal jurisdiction is otherwise present, under the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938). *Cf. Woods* v. *Interstate Realty Co.*, 337 U.S. 535 (1949) (federal courts entertain diversity action only if plaintiff has state-based standing to pursue state cause of action).

B. The Lease Claim "Arises Under" The Federal Statutory Scheme, Giving The Court Federal Question Jurisdiction.

The tenants' complaint in its second claim relies upon state law for their right to sue, but the substance of the lease provision upon which the claim is based is a matter of federal law rather than state law. The law in question, of course, is the Brooke Amendment to USHA and its implementing regulations. The complaint alleged that the inclusion of "reasonable amounts of utilities" in public housing rent is a requirement of federal law (¶ 9, JA6); that the defendant Authority's establishment of allowances is governed by federal law (¶ 10,JA6); and that

the defendant Authority was required to follow the method prescribed in federal law in calculating allowances (¶¶ 11-13, JA6). The undertaking of paragraph 4 of the Authority's lease ("agrees to furnish . . . utilities as reasonably necessary . . .") can only be determined against these mandatory federal descriptions of what constitutes "reasonable amounts of utilities." By contrast there is no Virginia state or local law which regulates the provision of electricity allowances by landlords or sets any meaningful points of reference for this lease provision.

The Supreme Court has long recognized that a case "arises under" federal law where the vindication of a right under state law necessarily turns on some construction of federal law. *See e.g. Smith* v. *Kansas City Title & Trust Co.*, 255 U.S. 180 (1921); *Hopkins* v. *Walker*, 244 U.S. 486 (1917). Yet another formulation tests whether the federal matter "necessarily appears in plaintiff's statement of his own claim in the bill or declaration," *Taylor* v. *Anderson*, 234 U.S. 74, 75-76 (1914); or whether the right or immunity created by federal law amounts to "an element, and an essential one, of the plaintiff's cause of action," *Gully* v. *First Nat'l Bank*, 299 U.S. 109, 112 (1936). Only three years ago this Court said that a plaintiff's cause of action created by state law nonetheless "arises under" the laws of the United States

> if a well-pleaded complaint establishes that its right to relief under state law requires resolution of a substantial question of federal law in dispute between the parties.

Franchise Tax Bd. v. *Construction Lab'rs Vacation Trust*, 463 U.S. 1, 13 (1983). *See generally* 13B WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE, § 3562 (1984).

The federal question in this case is pled as an essential element of the tenants' lease claim in the original complaint, and has been methodically asserted as much from

the very first briefing in the district court. See in the record Plaintiffs' Brief in Support of Summary Judgment, p. 20; Brief of Appellants, p. 28. The federal question posed is not mere anticipation of a defense. Since the tenants had the requisite right of action on their lease and had showed the existence of a substantial federal question essential to their claim, the courts below had no discretion to decline federal question jurisdiction.

C. The Fourth Circuit's Refusal To Hear The Lease Claim Erroneously Abolishes Federal Question Jurisdiction In Most Contract Cases.

The implications of refusing to entertain the present lease claim are significant; by its treatment, the Fourth Circuit has effectively abolished federal question jurisdiction in those contract cases where only the substantive right is federal in nature. Apparently the Fourth Circuit would exercise federal question jurisdiction only where both the underlying right and the right to sue are federal in nature. Thus federal jurisdiction over labor contracts governed by the Labor Management Relations Act might be denied; *Avco Corp* v. *Aero Lodge No. 735, Int'l Ass'n of Machinists*, 390 U.S. 557 (1968), which was specifically approved in the *Franchise Tax Board* case, would be dishonored. Similarly, stockholder suits to enjoin investment in securities of an unconstitutional nature would be barred by the Fourth Circuit treatment, overturning the classic holding of *Smith* v. *Kansas City Title & Trust Co.*, 255 U.S. 180 (1921).

Such a rule has no basis in this Court's controlling decisions, and is specifically contrary to the *Franchise Tax Board* holding. The Fourth Circuit's truncation of federal jurisdiction was entirely erroneous and must be reversed in order to return coherence to the law of federal jurisdiction.

D. A Holding That This Lease Provision Raises A Federal Question Will Not Transform All Public Housing Lease Disputes Into Federal Cases.

The Authority's repeated warning that every screen repair will become a federal case is fatuous. Petitioners do not assert that the federal funding and statutory scheme for public housing transform the entire lease between every PHA and its tenants into a "federal contract" always enforceable in federal court, *see e.g. Int'l Ass'n of Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682 (1963); *cf. Jackson Transit Auth.* v. *Local 1285 ATU*, 457 U.S. 15 (1982). While the lease as a whole reflects the federal background of the program, most of its provisions stand on their own and do not depend for their meaning on any underlying federal law. Paragraph 4 of the lease is unusual in the extent to which it must incorporate the specific and mandatory standards found only in the federal law, in order to have any legitimate meaning.

In its reliance upon federal law this lease provision is completely different, for example, from that in the Fourth Circuit's *Perry* case. The focus of the *Perry* lease argument was upon the maintenance of public housing units in decent condition—an argument for which the applicable standards were those of state and local law, not federal law. 664 F.2d at 1216-17. The present tenants need not argue with the Fourth Circuit's treatment of that claim as one of discretionary pendent jurisdiction, or the relegation of that lease claim t[illegible] state courts. Not all public housing lease claims raise [illegible]egitimate federal questions. This one does.

Federal court treatment of this lease claim is also justified to preserve the effort of Congress to create, in the Brooke amendment, a single national standard for tenant rents; and the intent of HUD to "alleviate confusion" in utility allowances by maintaining "mandatory standards . . . applicable to all PHAs," 45 Fed. Reg. 59502 (1980).

Relegating this claim to state court would inevitably produce a welter of varied standards. Virginia recognizes no class action remedy, so as many as 1100 individual tenant suits might be necessary to obtain relief for all affected by this one PHA. Since individual tenant claims would seldom reach the $1000 jurisdictional threshhold of Virginia's trial court of record, they would be resolved in the lowest court not of record, which has no experience and little capacity for federal law issues. Those judges would be as offended as common sense itself at the pretense that only they should construe the Brooke Amendment and utility regulations relating to this lease provision. This approach would be no service to the cause of federalism, the intent of Congress, or the vindication of federal rights.

CONCLUSION

For these reasons, this Court should reverse the judgment of the Court of Appeals for the Fourth Circuit and remand the case to the District Court for the Western District of Virginia for disposition of petitioners' motion for summary judgment or other resolution upon the merits.

Respectfully submitted,

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STATUTORY APPENDIX

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28 U.S.C. § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an acton at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1437a. (effective January 1, 1980) [Brooke Amendment portion emphasized]

When used in this Act—

(1) The term, 'low-income housing' means decent, safe and sanitary dwellings within the financial reach of families of low income, and embraces all necessary appurtenances thereto. Except as otherwise provided in this section, income limits for occupancy and rents shall be fixed by the public housing agency and approved by the Secretary. *The rental of any dwelling unit shall not exceed that portion of the resident family's income which the Secretary establishes on the basis of the relative level of income of the family, but such rental shall not exceed 25 per centum of family income in the case of a very low income family or, in the case of other families, 30 per centum of such income.* Notwithstanding the preceding sentence, the rental for any dwelling unit shall not be less than the higher of (A) 5 per centum of the gross income of the family occupying the dwelling unit, and (B) if the family is receiving payments for welfare assistance from a public agency and a part of such

payments, adjusted in accordance with the family's actual housing costs, is specifically designated by such agency to meet the family's housing costs, the portion of such payments which is so designated. At least 20 per centum of the dwelling units in any project placed under annual contributions contracts in any fiscal year beginning after the effective date of this section shall be occupied by very low-income families. In defining the income of any family for the purpose of this Act, the Secretary shall consider income from all sources of each member of the family residing in the household, except that there shall be excluded—

(A) the income of any family member (other than the head of the household or his spouse) who is under eighteen years of age or is a full-time student;

(B) the first $300 of the income of a secondary wage earner who is the spouse of the head of the household;

(C) an amount equal to $300 for each member of the family residing in the household (other than the head of the household or his spouse) who is under eighteen years of age or who is eighteen years of age or older and is disabled or handicapped or a full-time student;

(D) nonrecurring income, as determined by the Secretary;

(E) 5 per centum of the family's gross income (10 per centum in the case of elderly families);

(F) such extraordinary medical or other expenses as the Secretary approves for exclusion; and

(G) an amount equal to the sums received by the head of the household or his spouse from, or under the direction of, any public or private nonprofit child placing agency for the care and maintenance of one or more persons who are under eighteen years of age and were placed in the household by such agency.

42 U.S.C. § 1437a. Rental payments; definitions (effective October 1, 1981)

(a) Dwelling units assisted under this Act shall be rented only to families who are lower income families at the time of their initial occupancy of such units. Reviews of family income shall be made at least annually. A family shall pay as rent for a dwelling unit assisted under this Act (other than a family assisted under section 8(o) [42 USC § 1437f(o)]) the highest of the following amounts, rounded to the nearest dollar:

(1) 30 per centum of the family's monthly adjusted income;

(2) 10 per centum of the family's monthly income; or

(3) if the family is receiving payments for welfare assistance from a public agency and a part of such payments, adjusted in accordance with the family's actual housing costs, is specifically designated by such agency to meet the family's housing costs, the portion of such payments which is so designated.

. . .

24 C.F.R. § 860.403 Definitions (1982) (redesignated 24 C.F.R. § 960.403 effective March 26, 1984)

The definition of family and other related terms contained in Part 812 of this chapter shall be applicable to this subpart. For the purpose of this subpart the following terms shall have the following meaning.

(a) **Contract rent.** Contract rent means the rent charged a tenant for the use of the dwelling accomodation and equipment (such as ranges and refrigerators but not including furniture), services, and reasonable amounts of utilities determined in accordance with the PHA's schedule of allowances for utilities supplied by the project. Contract rent does not include charges for utility consumption in excess of the public housing agency's schedule of allowances for utility consumption, or other miscellaneous charges. This definition of contract rent is not the same as contract rent for purposes of Parts 880 and 889 of Title 24.

(i) **Gross rent.** Gross rent means contract rent plus the PHA's estimate of the cost to the tenant of reasonable quantities of utilities determined in accordance with the PHA's schedule of allowances for such utilities, where such utilities are purchased by the tenant and not included in the contract rent. This definition of gross rent is not the same as gross rent for the purposes of Parts 880 to 889 of Title 24.

24 C.F.R. §§ 865.470-.482 (1983) All were redesignated as 24 C.F.R. § 965.470-.482 effective March 26, 1984; 24 C.F.R. § 965.470-.480 were amended by 49 Fed. Reg. 31408-10, August 7, 1984.

24 C.F.R. § 865.470 Purpose. (1983)

The purpose of §§ 865.470 through 865.482 is to establish procedures to be used by PHAs in establishing and administering Allowances for PHA-Furnished Utilities and Allowances for Tenant-Purchased Utilities. Allowances for PHA-Furnished Utilities represent the maximum consumption units (e.g., kilowatt hours of electricity) which may be used by a dwelling unit without a surcharge for excess consumption against the tenant. Allowances for Tenant-Purchased Utilities represent fixed dollar amounts which are deducted from the Gross Rent otherwise chargeable to a tenant who pays the actual Utility charges directly to the Utility suppliers whether they be more or less than the amounts of the Allowances.

24 C.F.R. § 865.471 Applicability. (1983)

(a) Except as provided in paragraph (b) of this section, §§ 865.470 through 865.482 apply to all dwelling units assisted under the United States Housing Act of 1937 in projects owned by or leased to PHAs and leased or subleased by PHAs to tenants, except the Section 8 Housing Assistance Payments Program and the Mutual Help Homeownership Opportunities Program.

(b) Sections 865.470 through 865.482 do not apply to dwelling units which are served by PHA-Furnished Utilities unless Checkmeters have been installed to measure the actual Utilities consumption of the individual units but tenants in such units are subject to charges for consumption of tenant-owned major appliances in accordance with § 866.4 of this chapter.

24 C.F.R. § 865.472 Definitions. (1983)

Checkmeter. A device for measuring Utility consumption of each individual dwelling unit where the Utility service is supplied through a Mastermeter System. The PHA pays the Utility supplier for the Utility service on the basis of the Mastermeter readings and uses the Checkmeters to determine whether and to what extent of the Utility consumption of each dwelling unit is in excess of the Allowances for PHA-Furnished Utilities.

Contract Rent. The amount of rent payable by the tenant to the PHA. In the case of PHA-Furnished Utilities, the Contract Rent is the same as the Gross Rent. In the case of Tenant-Furnished Utilities the Contract Rent is the Gross Rent minus the amount of the Allowances for Tenant-Purchased Utilities. This definition of Contract Rent is not the same as contract rent for purposes of 24 CFR Parts 880 to 889.

Gross Rent. The rent chargeable to a tenant for the use of the dwelling accommodation and equipment (such as range and refrigerator, but not including furniture), services, and Utilities not to exceed the Allowances for PHA-Furnished Utilities or the Allowances for Tenant-Purchased Utilities, as applicable. This definition of Gross Rent is not the same as gross rent for purposes of 24 CFR Parts 880 to 889.

Mastermeter System. A Utility distribution system in which a PHA is supplied Utility service by a Utility supplier through a meter or meters and the PHA then distributes the Utility service to its tenants.

Surcharge. The amount charged by the PHA to a tenant, in addition to the tenant's Contract Rent, for consumption of Utilities in excess of the Allowance of PHA-Furnished Utilities included in the Contract Rent.

Utility. Electricity, gas, heating fuel, water and sewage service, and trash and garbage collection. Telephone service is not included as a Utility.

24 C.F.R. § 865.473 Establishment of allowances of PHAs. (1982) (revised 47 Fed. Reg. 19123, May 4, 1982)

(a) **Basic Requirement.** PHAs shall establish (1) allowances for PHA-Furnished Utilities for all Checkmetered Utilities and (2) allowances for Tenant-Purchased Utilities for all Utilities purchased directly by tenants from the Utilities supplier. These Allowances shall be incorporated into the PHA's rent schedules and shall be submitted for approval by the HUD field office, after compliance with requirements of notice to tenants prescribed under 24 CFR Part 861.

(b) **Authorized Uses of Utilities on which Allowances Are Based.** Allowances for both PHA-Furnished and Tenant-Purchased Utilities shall be designed to include Utility consumption requirements for major equipment furnished by the PHA (for example, heating furnace, hot water heater, range and refrigerator) and for minor items of equipment (such as toasters and can openers) furnished by the tenants. To avoid misunderstanding, the PHA shall include with the rent schedules a statement of the specific items of major equipment whose Utility consumption requirements were included in determining the amounts of the Allowances. This does not mean that tenants may not supply and use other items of major equipment, but if they do so the cost of any Utility consumption in excess of the applicable allowance will have to be borne by the tenant.

24 C.F.R. § 865.474 Dwelling Unit categories for establishment of allowances. (1983)

(a) **Structure type Categories.** Separate Allowances shall be established for each utility and for each category of dwelling units within structures which are reasonably comparable as to age and construction type, have the same utility combination and the same type and size of major equipment.

Walk-up apartments, elevator buildings, row or townhouse dwellings, and detached or semi-detached dwellings shall constitute different structure types, but consideration may also be given to other major construction differences which have a significant effect on utility consumption. Generally, PHAs should include in the same structure type category all structures of similar design and equipment which were constructed at about the same time and are located within an area which experience very similar weather conditions.

(b) **Scattered site units.** In the case of scattered site dwelling units which were acquired by the PHA, with or without rehabilitation, the PHA shall determine to what extent the units are comparable so as to permit their being treated as one structure type category for purposes of establishing Allowances. If the number of units which can be reasonably so grouped is insufficient for this purpose (i.e., generally, less than 25 units), the PHA should include in its data base the best available Utility consumption data with respect to comparable units not in the PHA's program. In such cases, the PHA shall monitor the consumption experience of the units within its program as well as the non-PHA units, and thereafter revise its data base in light of that experience (see § 865.476).

(c) **Dwelling Unit Categories by Size of Dwelling Unit.** Within each structure type category, separate Allowances shall be established for units of different size, i.e., Efficiency or 0-bedroom, 1-bedroom, 2-bedroom, 3-bedroom, 4-bedroom, 5 or more-bedroom. Variations shall not be made for such factors as dimensions of the rooms or dwelling units and generally not by reason of factors such as upper or lower floor, number of exposed walls, or direction of exposure. However, if the PHA determines that there are sufficient differences between dwelling units it may designate a category to reflect those differences.

24 C.F.R. § 865.475 Characteristics of allowances. (1983)

(a) **For PHA-Furnished Utilities.** Preference shall be given to setting Allowances on a quarterly basis appropriately

adjusted to reflect season variations, because this results in lower costs for meter reading and bookkeeping, and may also reduce the number of tenants surcharged due to averaging consumption over the three-month period. Monthly Allowances may be used where justified by special circumstances such as high tenant turnover or where excess consumption is extremely high. If in a locality the billing for a Utility, such as water and sewage service, is on a longer-term basis, such as semi-annually, the Allowance computed for that Utility may be set for a corresponding period and prorated to the quarterly allowance.

(b) **Tenant-Purchased Utilities.** The amount of the Allowance for Tenant-Purchased Utilities is deducted from the Gross Rent in computing the amount of the Contract Rent payable by the tenants to the PHA. Monthly Allowances shall be established at a uniform amount, based on average monthly utility requirements for a year; however where utility company level payment plans (customers of a utility company pay to the utility company a uniform amount each month) are unavailable to PHA tenants and a uniform monthly allowance may result in hardships the allowances established may provide for seasonal variations. HUD, if approving this action, will provide the PHA with instructions regarding adjustments necessary in the rental income estimates used for computation of operating subsidy payable under the Performance Funding System.

24 C.F.R. § 865.476 Data upon which allowances shall be based (PHA-Furnished and Tenant-Purchased Utilities). (1983)

(a) **Where records are available for the particular housing.** The portion of the Allowance applicable to each Utility shall be based upon the consumption records (consumption and cost records in the case of Tenant-Purchased Utilities) for the particular structure type category (§ 865.474) for the most current th ee-year period. Because of seasonal variations in the use of Utilities, each year shall consist of 12 consecutive months. If records are not available for a three-year period, the

PHA shall use records for the most current two-year period or, if such records are unavailable, for the most current one-year period. If records are not available for the particular housing category for the entire year, records for the most comparable PHA housing will be used. Allowances based on records for only a one-year period should be adjusted for normal weather conditions.

(b) **Where records are not available for the particular housing.** For new housing or existing housing for which adequate records covering a full year are not available, the Allowances shall be based on records for the most comparable PHA housing in the area as to construction type and size of units, utility combinations, climatic conditions, and types of equipment. Utilities data for comparable projects shall be obtained from the records of PHAs, the Utility suppliers or the HUD Field Office. See also § 865.474(b) with respect to scattered site dwelling units.

(c) **Source of data for Tenant-Purchased Utilities.** In the case of Tenant-Purchased Utilities, the PHA must establish a special procedure for obtaining the consumption data for those dwelling units. The PHA shall utilize a method which it finds best taking into consideration practicability, reliability, and administrative cost. Such methods may include, for example, arrangements with Utility suppliers to furnish consumption data to the PHA (without identification of the users, if the Suppliers so prefer); meter readings by the PHA; having the tenants furnish copies of their utility bills (or making them available for copying) in connection with the payments of their monthly rents.

24 C.F.R. § 865.477 Standards for allowances for PHA-furnished utilities. (1983)

The Allowances for PHA-Furnished Utilities for each dwelling unit category and unit size shall be established in terms of consumption units, sufficient to meet the requirements of about 90% of the dwelling units in the category. Conversely, the Allowances should be such as are likely to result in surcharges

for about 10% of the dwelling units. The basic method of determining the Allowances should be as follows:

(a) The dwelling unit consumption data for all units within each dwelling unit category and unit size should be listed in order from low to high consumption for each billing period.

(b) The PHA should determine whether there are any unusually high instances of consumption which might be due to unusual individual circumstances, wasteful practices, or use of the Utility for tenant-supplied major appliances. The PHA should exclude such cases from consideration in calculating the amount of the allowance.

(c) Where the available data covers two or more years, averages should be computed and adjustments made, if warranted, by reason of abnormal weather conditions or other changes in circumstances affecting utility consumption.

(d) The Allowances should then be established at the level which can reasonably be expected to meet the requirements of 90% of the dwelling units in the category.

24 C.F.R. § 865.478 Standards for allowances for tenant-purchased utilities. (1983)

In the case of Tenant-Purchased Utilities, the Allowance is provided in terms of a fixed number of dollars made available to each tenant in the dwelling unit category for purposes of paying his or her Utility bills. If a tenant's Utility expense is less than the Allowance, the tenant retains the benefit, while if a tenant's Utility expense is more than the Allowance, the tenant must absorb the excess cost. In these circumstances, in order for the total Utility expense to the PHA for the particular dwelling unit category to be equal to the total of the Utility bills for all the dwelling units in that category, the amount of the Allowance for each dwelling unit must be established at the average amount per dwelling unit. Accordingly, the basic method of determining the Allowance should be as follows:

(a) Proceed as stated in paragraphs (a) through (c) of § 865.477.

(b) Determine the total amount of consumption for each month for all the dwelling units in the category, and divide by the number of dwelling units, in order to obtain the average amount of consumption per dwelling unit for that month.

(c) Apply the current rate structure of the Utility supplier to each month's average amount of consumption in order to compute the dollar cost of each month's average amount of consumption. The result will be the monthly Allowances for Tenant-Purchased Utilities for the particular Utility and dwelling unit category involved.

24 C.F.R. § 865.479 Surcharges for excess consumption of PHA-furnished utilities. (1983)

PHAs shall include in their rent schedules for dwelling units subject to Allowances for PHA-Furnished Utilities, schedules of Surcharges indicating the additional dollar amounts tenants will be required to pay for Utility consumption in excess of the Allowances. These Surcharge Schedules may show the amounts of Surcharge for specific blocks of excess consumption rather than amounts computed on a straight per-utility-unit basis. The amount of the Surcharge for each block shall be computed by applying the Utility Supplier's average rate to the amount of excess consumption.

24 C.F.R. § 865.480 Review and revision of allowances. (1982) (revised 47 Fed. Reg. 19124, May 4, 1982)

(a) **Revision by Reason of Inadequate Data Base (for PHA-Furnished Utilities).** Where the data base for establishment of the Allowance consisted of less than three years for the particular housing, the PHA shall review the Allowances at the end of each year, taking into consideration the data for the particular housing, until an Allowance based on records for three years for the particular housing has been established.

(b) **Allowance for PHA-Furnished Utilities.** (1) At the end of each quarterly or other billing period, in connection with the determination of surcharges, the PHA shall determine the number and percentage of tenants who are subject to sur-

charge. When the PHA finds that the percentage of surcharge cases is more than 25 percent of a category and there is no reason of a non-recurring nature (such as weather extremes) to account for this, the PHA shall review the consumption data and if appropriate, establish a revised Allowance in accordance with § 865.477.

(2) No separate revisions in the allowance by reason of changes in Utility rates are necessary because the PHA is billed directly by the Utility suppliers at their current rates and, by the same token, the PHA uses current rates in computing surcharges.

(c) **Allowances for Tenant-Purchased Utilities.** (1) Since the tenants in these cases are billed directly by the Utility suppliers at their current rates, the PHA shall monitor the rates on a monthly basis. Whenever there is a rate change which, by itself or together with prior rate changes not adjusted for, results in a change of 10 percent or more, the PHA shall revise the Allowance accordingly.

(2) The average consumption levels on which the Allowances are based shall be reviewed and revised in accordance with § 865.478 in the event of any change in circumstances indicating probability of a significant change in average consumption levels, but in any event once every three years.

(d) **Effective Date of Revised Allowances.** In order to allow a reasonable time for PHA determination and processing of a revision in Allowances, a revised Allowance shall take effect with the next billing period following compliance with requirements of notice to tenants prescrib [sic] under 24 CFR Part 861.

24 C.F.R. § 865.481 Individual relief. (1983)

(a) Requests for relief from surcharges for excess consumption of PHA-Furnished Utilities or from Utility supplier billings in excess of the Allowances for Tenant-Purchased Utilities may be submitted to the PHA on the following grounds:

(1) The consumption for the billing period is so far out of line with previous billing periods (seasonally adjusted) as to indicate a possible defect in the meter or error in the meter reading.

(2) A defect in the dwelling unit of PHA-Furnished equipment is causing a substantial and abnormal increase in Utility consumption. The term "defect" means a condition which the PHA has a duty to repair, such as windows or doors which do not close in accordance with their original design, broken windows, damaged walls, etc. The term "defect" does not include a deficiency in the original design, such as inadequate insulation by current standards, absence of storm windows, etc.

(3) In the case of Tenant-Purchased Utilities only, that the utility consumption exceeds the applicable Allowance by 20 percent or more for reasons other than wasteful or unauthorized usage.

(b) Requests for relief on the grounds authorized by this section shall be investigated by the PHA, which shall conduct or cause to be conducted, an energy audit of the unit to determine whether excess utility consumption is reasonable, given the characteristics of the specific dwelling unit, and appropriate relief shall be granted in accordance with the findings of the PHA.

(c) Where the PHA finds that excess utility consumption is due to wasteful or unauthorized usage, the PHA shall advise and assist the tenant on methods of reducing the utilities usage. This advice and assistance may include counseling, installation of new energy conserving equipment or appliances and corrective maintenance.

24 C.F.R. § 865.482 Establishment of allowances under §§ 865.470 through 865.481. (1983)

It is recognized that a reasonable time must be allowed for PHAs to assemble the records and data and establish allowances in accordance with the standards and procedures

set forth in §§ 865.470 through 865.481, after providing an opportunity for tenant comment as required by § 866.5 of this chapter. Accordingly, PHAs shall proceed to accomplish these results as promptly as possible, but shall establish such allowances effecive as of a date no later than 120 days from the effective date of this rule or extended date, if approved by HUD.